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Supreme Court, U.S.
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No. 00-1842

IN THE

Supreme Court of the United States

STATOIL ASA,

Petitioner,

v.

HEEREMAC V.O.F., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

James R. McGibbon
Teresa Wynn Roseborough
SUTHERLAND ASBILL &
BRENNAN, LLP
999 Peachtree Street, NE
Atlanta, GA 30309

Jacob Dweck
Rebecca L. Hirsch
SUTHERLAND ASBILL &
BRENNAN, LLP
1275 Pennsylvania Ave., NW
Washington, DC 20004

Seth P. Waxman
(Counsel of Record)
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, DC 20037
(202) 663-6800

Thomas C. Goldstein
GOLDSTEIN & HOWE, P.C..
4607 Asbury Place, NW
Washington, DC 20016

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

By invitation of the Court, the Solicitor General has filed a brief recommending against the grant of certiorari. The government argues that the issue is not ripe for review, that the decision of the Fifth Circuit will not impair its own antitrust enforcement efforts, and that the Fifth Circuit's decision is in any event correct on the merits. We respond briefly to each of these points.

A. The Issue Presented Is Ripe for Review.

The government contends that the decision below is not in irreconcilable conflict with the District of Columbia Circuit's decision in *Caribbean Broadcasting System, Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998), because, while the D.C. Circuit found subject matter jurisdiction based on the U.S. domestic impact of the defendant's conduct, it never precisely addressed the narrow issue of whether section 6(a)(2) of the Foreign Trade Antitrust Improvements Act should preclude the plaintiff's claim. Regardless of whether the Court accepts the government's argument that there is technically no conflict, it cannot be denied that the D.C. Circuit reached a legal conclusion contrary to the court below and found jurisdiction on similar facts. As Judge Higginbotham aptly stated, the *Statoil* and *Caribbean* cases together leave the state of the law in a "muddled mess."

The government contends that the question presented is not ripe because there are pending cases in other circuits and that the Court should wait to see if the decisions of these courts present a conflict with *Statoil*. The pendency of so many cases simply attests to the extreme importance of this issue in the context of the government's own initiative to deal with cartels engaged in world-wide conspiracies. The primacy of this issue calls out for an authoritative determination at an early time so as to avoid the enormous expense and international ramifications of a delayed resolution.

None of the pending cases cited will present as good a vehicle as this one for a prompt determination of this issue, for none presents so clearly and simply the essential legal issue to be determined. As the government admits, the Statoil conspiracy undeniably involved a "global price-fixing and market allocation scheme." (U.S. Brf. 1.) There was a single, integrated conspiracy involving a tiny number of competitors operating in what is undeniably a global market (as opposed to a number of parallel conspiracies operating in parallel national markets, as arguably was the case in many of the cases cited). Moreover, as a result of the world-wide market allocation scheme, the harm inflicted on Statoil was suffered entirely abroad and yet was inextricably linked to the corresponding harm suffered by U.S. oil producers in the Gulf of Mexico. Thus, but for the narrow interpretation of section 6(a)(2) adopted by the Fifth Circuit, subject matter jurisdiction would clearly be present.

Furthermore, in the procedural context of the pending cases cited by the government, any ruling that would present a conflict with the Fifth Circuit's decision is likely be interlocutory rather than final in nature and hence not ripe for review under the Court's normal standards. *See, e.g., Virginia Military Inst.* v. *United States*, 508 U.S. 946, (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction" (collecting cases)). A ruling for the plaintiffs in all but one of those pending cases would require a remand to the District Court for further proceedings, including a trial on the merits.[1] Even assuming these cases proceed to judgment without settlement, it would be many years before the Court would finally have the opportunity to review this issue – years in

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[1] The only exception in which a conflicting final judgment could conceivably arise without a subsequent trial is *Litton Systems, Inc.* v. *Honeywell, Inc.*, No. 99-56892 (9th Cir. argued Mar. 5, 2001). The history of that case is extremely complicated, and the question presented here is relevant to only a very small aspect of the overall assessment of damages that is being appealed to the Ninth Circuit. Accordingly, the case is highly unlikely to present a suitable vehicle for the Court's review.

which U.S. lower courts and business interests everywhere would be forced to operate in the face of uncertainty on this highly important issue. Congress avowedly enacted the FTAIA to limit just such uncertainty. See H.R. Rep. No. 97-686, *Foreign Trade Antitrust Improvements Act* of 1982, 97th Cong., 2d Sess. 2, at 5, 8-9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490, 2493-94, (*"FTAIA Committee Report"*). A grant of certiorari in this case would promote that congressional purpose.

B. The Fifth Circuit's Decision Will Impair the Efficacy of Overall U.S. Antitrust Enforcement.

The government maintains that the Statoil decision will have no adverse impact on its own enforcement of the antitrust laws. We agree that the Fifth Circuit's interpretation of section 6(a)2 of the FTAIA should not directly bar the government from prosecuting criminally those whose conspiracy has the requisite jurisdictional effect on U.S. commerce. That is, the government may prosecute conspirators based on the domestic effect, even if they may not take into account the effect overseas.[2] In other respects, however, the arguments pressed by the Solicitor General seem more tenuous. And they take no account whatsoever, of the crucial role that *private* litigation plays in the overall antitrust enforcement scheme Congress enacted.

The government contends, for example, that effects on foreign commerce may be taken into account as an "aggravating circumstance" in assessing fines. Although one can readily appreciate that the government would not want to acknowledge any limitation on its sentencing authority, if U.S. courts have no subject matter jurisdiction over overseas effects of the conspiracy, it is far from clear why such effects are nonetheless

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[2] One must at least question, however, what mischief might be wrought on this issue by the Fifth Circuit's incorrect assertions that U.S. antitrust jurisdiction is constitutionally limited in these circumstances and that a "presumption against extraterritoriality" applies. (Pet. App. 16a; *but see* U.S. Brf. 11 (acknowledging that this presumption does not apply).) For example, query how these principles would apply to a defendant like respondent Saipem, whose role in a conspiracy is to agree *not* to engage in any commerce in the United States.

properly construed as an "aggravating circumstance." As the government acknowledges, the concept of aggravating circumstances is meant to address elements of a crime that are not taken into consideration in assessing the Base Fine. (2001 Federal Sentencing Guideline Manual § 5K2.0; U.S. Brf. at 9-10.) But the sentencing guidelines expressly do take into account the amount of commerce "affected by the violation." (See USSG § 2R1.1(b)(2).) If the applicable commerce affected is limited to domestic commerce, as the government believes (U.S. Brf. at 8-9), then this should preclude consideration as an aggravating circumstance of additional commerce beyond the scope of the substantive U.S. proscription.

The government argues that its authority to obtain enhancements based on foreign commerce affected is supported by its negotiation of plea agreements on this basis in two cases, one of them involving the prosecution of respondent HeereMac in connection with the conspiracy at issue here. However, these sentences were negotiated before the Fifth Circuit rendered its decision, and they represented a compromise with respect to the very issue presented in this case. Pet. App. 62a. It seems highly unlikely that the government will find it equally easy to negotiate such plea agreements in the future.

Finally, the appropriate issue here is not limited to the government's interest in its own enforcement authority but rather to the overall interest of the United States in enforcing its antitrust laws. The U.S. antitrust laws rely heavily on private enforcement to assure compliance and deter wrongdoing. As both this Court and Congress have recognized, if private plaintiffs cannot recover damages suffered abroad resulting from a global conspiracy that adversely affects U.S. commerce, deterrence will be inadequate and U.S. consumers will be placed at risk. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 314 (1978); *FTAIA Committee Report* at 10, 1982 U.S.C.C.A.N. at 2495.

C. The Court of Appeals' Ruling Is Incorrect on the Merits.

The government's brief finally asserts that the Fifth Circuit's decision correctly interprets section 6(a)(2) of the FTAIA on the

merits. Our petition and reply brief fully explain why the Fifth Circuit's interpretation is unsupportable. We respond below only to the government's points.

First, the Solicitor General makes the conclusory argument that the Fifth Circuit's interpretation is the "most natural reading" of section 6(a)(2) in context. But surely the "most natural meaning of the phrase "give rise to a claim" is "give rise to a claim," not "give rise to the claim of the *particular plaintiff* that is before the court," as the government would have it. (U.S. Brf. 12 (emphasis in brief).) The government's statement that its interpretation is the most natural reading "in the context" is circular, reflecting simply a conclusion that it is the most natural reading to achieve the interpretation adopted by the Fifth Circuit and promoted by the government.[3]

Perhaps absent extrinsic evidence of any alternative purpose, one might surmise that Congress intended the Fifth Circuit's interpretation and that the congressional use of the phrase "give rise to a claim" was simply imprecise drafting designed to achieve this goal. But Congress fully explained its rationale in the legislative history, and this rationale is entirely consistent with the precise statutory language. The House Report expressly states that the purpose of section 6(a)(2) is to assure that an international conspiracy's effect in this country must be not only direct, substantial, and reasonably foreseeable, but also anticompetitive (rather than benign or neutral) in order to give rise to U.S. jurisdiction over such conspiracy. *FTAIA Committee Report* at 11, 18, 1982 U.S.C.C.A.N. 2496, 2500. This principle applies whether the claim is asserted by a private

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[3] The actual statutory context makes it clear that the statute's touchstone is whether the *conduct* of the defendants is subject to the law, rather than the *effect* of that conduct. The only exception in which effect does become relevant is contained in the proviso that excuses exporters from liability for effects in foreign markets, but only when the conduct has no effect on domestic commerce. See Pet. 15. This proviso – which the Solicitor General does not discuss – would in turn be rendered meaningless by the Fifth Circuit's interpretation. *Id.*, n.12.

party or the government and precludes claims only when the conduct has no anticompetitive effect in this country at all.

The government's argument (U.S. Brf. 12-13) that Congress intended through section 6(a)(2) to import concepts of standing into considerations of subject matter jurisdiction is belied by the express statement in the House Report that, "the Committee does not intend to alter existing concepts of antitrust injury or antitrust standing." *Id.* at 11, 1983 U.S.C.C.A.N. at 2496. The government's brief also ignores the substantial additional legislative history cited in the Petition, which demonstrates Congress' intent to permit claims in foreign commerce in these circumstances, and Congress' repeated rejections of statutory language that would have supported the interpretation adopted by the Fifth Circuit. See Pet. 12-13 & nn.10-11.

The government next argues (U.S. Brf. 14) that Statoil's interpretation raises the specter of claims being filed in cases where the impact in this country is substantial but nevertheless small in comparison with the impact abroad. Even should this occur, it would not properly invoke the concept of subject matter jurisdiction. Instead, the selection of an appropriate forum for the adjudication of claims involving overlapping jurisdiction is properly based on other concepts such as comity, abstention, and forum non conveniens.[4]

Finally, the government asserts (U.S. Brf. 15-16) that the Fifth Circuit's interpretation of section 6(a)(2) should be adopted because enactment of new antitrust legislation by many foreign countries has allegedly narrowed the gap in deterrence that would necessitate recovery of damages suffered overseas. As a matter of statutory interpretation, however, such

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[4] Similar issues involving overlapping jurisdiction arise with respect to governmental enforcement in the context of the antitrust review of international mergers and criminal enforcement against international cartels. The government may choose to defer to a foreign authority in some such instances. Nevertheless, the government surely does not mean to argue that it should be denied the jurisdiction to proceed where there is a substantial impact in this country, even if the impact may be greater abroad.

subsequent events are irrelevant in determining congressional intent in adopting the FTAIA, for Congress was necessarily concerned with the adequacy of enforcement at the time of enactment. *See MCI Telecomm. Corp.* v. *AT&T,* 512 U.S. 218, 227 (1994) (the most relevant time for determining a statutory term's meaning is when the statute became law).

Moreover, the government's point simply ignores the practical difficulties faced by multiple U.S. and foreign private plaintiffs and indeed governments in asserting multiple antitrust claims against multiple defendants in every jurisdiction affected by a global conspiracy. Deterrence cannot be adequate if it is impracticable to bring the actions necessary to obtain full restitution of ill-gotten gains. A cartel will bear full responsibility for its actions only if it can be called to account for all of the harm it has caused in a single court proceeding.

* * * * *

The issue presented in this case is of great importance, and this case provides the best and probably the only suitable vehicle for the prompt Supreme Court review that is appropriate. The statutory interpretation adopted by the Fifth Circuit presents a far more limited view of antitrust jurisdiction than the one adopted by Congress or reflected in the jurisprudence of this Court. For those reasons, and because the decision below will impair the efficacy of overall antitrust enforcement, the petition for a writ of certiorari should be granted.

Respectfully submitted,

James R. McGibbon
Teresa Wynn Roseborough
SUTHERLAND ASBILL & BRENNAN, LLP
999 Peachtree Street, NE
Atlanta, GA 30309

Jacob Dweck
Rebecca L. Hirsch
SUTHERLAND ASBILL & BRENNAN, LLP
1275 Pennsylvania Ave., NW
Washington, DC 20004

Seth P. Waxman
(Counsel of Record)
Wilmer, Cutler & Pickering
2445 M St., NW
Washington, DC 20037
(202) 663-6800

Thomas C. Goldstein
GOLDSTEIN & HOWE, P.C..
4607 Asbury Place, NW
Washington, DC 20016

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